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IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1979

NO. 79-164

IRVING A. KANAREK, Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, and

THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE

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IRVING A. KANAREK, Petitioner,

vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The Petitioner, Irving A. Kanarek respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, rendered March 1, 1973, denying Petitioner a hearing.

JURISDICTION

On November 1, 1972, the Court of Appeal of the State of California, Fourth Appellate District, made its order denying Petitioner a hearing of an application for writs of certiorari and mandamus, without opinion.

On March 1, 1973, the Supreme Court of the State of California made its order denying Petitioner a hearing in the same matter.

On June 23. 1973 Associate Justice William O. Douglas made an order extending the time for filing this petition to July 29, 1973.

The jurisdiction of this court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

When a state court is required by statute to appoint and to compensate private attorneys for all members of a certain class of indigent persons who are accused of serious crimes, may the court impose on the enforcement of such a statute a certain condition or reservation, to wit, that the attorney who is chosen by the accused must also be chosen by the court, without offending the accused's right to counsel under the Sixth Amendment or his rights to due process and equal protection

under the Fourteenth Amendment, in the absence of compelling reasons for the imposition of such a condition or reservation?

STATEMENT OF THE CASE

(a) Classification of the accused:

One Manson, being accused in a California trial court of certain murders, was determined by the trial court to be

(1) Indigent;

(2) Ineligible to be represented by the Public Defender.

A state statute, California Penal Code Section 987(a), required that private attorneys be appointed and publicly compensated to represent persons of that class.

In addition to determining that the defendant belonged to the above-described class, the court also determined that the defendant was not qualified to represent himself and that he was not to be permitted to represent himself; hence he must be represented by an attorney.

Thus, it appears that the said defendant was a member of a certain class of persons possessing the following identifying characteristics, to wit:

(1) Accused of serious crimes;

(2) Indigent;

(3) Ineligible to receive public defender services; (hence entitled to publicly-financed private representation); and

(4) Ineligible for self-representation (hence being unable to defend without counsel).

(b) Chronology:

A judge of the Respondent Court initially made an order permitting the defendant to represent himself; however, the trial judge later determined that the defendant should not be permitted to represent himself,[1/] and then appointed an attorney, without consulting the defendant as to this appointment. This was the only occasion on which the court selected an attorney for the defendant. This attorney was

---

1/ In People v. Sharp (1972) 7 C.3d 448, 449 P. 2d 489, the California Court held that State trial courts have discretion to refuse to permit otherwise-competent accused persons to represent themselves.

replaced within a few weeks by an unexperienced volunteer attorney, who represented the defendant briefly. Finally, the defendant designated Petitioner as his counsel for trial.

The trial court stated to the defendant that he had the right to be represented by counsel of his choice, but if the defendant wished to have counsel appointed under the statute the choice of counsel would be made by the court alone. The court did not put the matter with such directness, but the court's position and intent was clear enough in the following remarks of the court:

> "I think you have already declared your indigency, and, if you like, the court will appoint the finest lawyer available to represent you . . . On the other hand, you have the right to select your own attorney, as you apparently have done with Mr. Kanarek, if that is what you want to do."
>
> (Emphasis supplied)

> "Now, as I have stated to you before, and I will state to you

> again, you have the right to select your own counsel. However, if you want the court to use its discretion in appointing a competent counsel to represent you during the trial, the court will do that.
>
> (Emphasis supplied)

At all times mentioned herein, California law concerning the duties of attorneys in criminal cases included the following Particulars:

Section 608 of the California State Business and Professions Code provided that

> "It is the duty of an attorney. . . .
> (h) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."

In the case of People v. Massey (1955) 137 C.A. 2d 623, 290 P.2d 667, the California Court of Appeal remarked,

"Desertion of a client is inexcusable. . . . Having undertaken the defense of a criminal case an attorney must continue with his services until he is released by the court . . . . (Bus. & Prof. Code, §6068)."

(P. 626 of 137 C.A. 2d)

In the case of Hill v. Superior Court (1956) 46 C.2d 169, 174-175, 293 P.2d 10, the California Court held that the above-mentioned statutory duty of attorneys to accused persons justified the approval of a rather low award of attorneys' fees which had been made by a trial court under the California Appointment statute.

Petitioner accepted the defendant's case, although the trial court refused to appoint Petitioner under the statute. In granting the defendant's motion to enter Petitioner as his attorney, the trial court said,

"For the record, Mr. Kanarek, this is a private arrangement between you and Mr. Manson, and is not an appointment under 987(a) of the Penal Code."

Thereafter, from June 1, 1970 through April 19, 1971, Petitioner diligently represented the defendant in the trial court through all pre-trial and trial proceedings.

On April 17, 1972, Petitioner filed in the trial court a verified, itemized claim, in the usual form, for public compensation under the statute. The filing was timely. (Magnus v. Jackson, 1973, 31 C.A. 3d 399, _____ P.2d _____). On July 6, 1972, the trial court denied the claim.

On October 30, 1972, Petitioner filed a petition for mandate in the California Court of Appeal, Second Appellate District, which was the district in which the defendant had been tried, seeking an order directing the court to pay Petitioner for his services. Thereafter the petition was transferred by order of the California Supreme Court to the California Court of Appeal, Fourth Appellate District, where it was assigned the present California docket number, "4 Civ. No. 12365".

In this petition, Petitioner fully described the underlying proceedings in the trial court and contended that both the original order refusing to appoint Petitioner under the statute and the post-trial order denying Petitioner's claim for statutory compensation

violated the defendant's rights to counsel, due process and equal protection under the Sixth and Fourteenth Amendments. This petition for mandate was denied without opinion on January 26, 1973.

Within the time prescribed by California law, Petitioner filed a petition for hearing in the California State Supreme Court, raising the same constitutional issues, and on March 1, 1973 that court denied Petitioner's application without opinion.

Thereafter, on June 23, 1973, in this Court, Associate Justice William O. Douglas granted an order extending the time within which the within petition might be filed to July 29, 1973.

STATEMENT OF REASONS FOR GRANTING THE WRIT

Like all of the proliferating host of cases in this troublesome area of constitutional law, the issue is rooted in the great case of Gideon v. Wainright (1963) 372 U.S. 355, 9 L.Ed. 2d 799, 83 S.Ct. 792, which established the duty of states under the Sixth Amendment to provide counsel for indigent persons accused of serious crimes.

On March 5, 1973, four days after denying Petitioner's application for a hearing in this matter, the California Supreme Court decided the case of Drumgo v. Superior Court, 8 C.3d 930, _____ P.2d _____. As the following discussion of the Drumgo case will indicate, the Drumgo case clearly sets forth the level and the quality of the State's views of the constitutional issues which are presented in the instant case, and it is also apparent that the same views are the basis on which the California Court denied Petitioner's petition without opinion.

In Drumgo, the defendant, who was accused of murder and conspiracy to commit murder, was, like the defendant Manson in the instant case, a member of the class of accused persons who are entitled to be represented by publicly-compensated private counsel under the same statute (California Penal Code Section 987) and who are not permitted to defend pro se although being otherwise competent. As was the case with defendant Manson, Drumgo requested the appointment of a designated private attorney (Attorney Hodge) in whom he had confidence, but the trial court appointed its own chosen attorney, Mr. Breiner. As with the instant case, the attorney who was chosen by

the defendant but rejected by the trial court was ready, able and willing to serve under the statute.

Drumgo petitioned, successfully, in the California Court of Appeal for a writ of mandate ordering the trial court to appoint his chosen attorney. (See Opinion of the Court of Appeal, in Drumgo v. Superior Court, and reported in the Advance Sheets of the Official California Reports at 26 C.A. 3d 647 but not reported in the bound volume.)

The California Supreme Court took the case over and reversed the order of the Court of Appeal. Five Justices joined in the opinion and two dissented.

The majority opinion was based on two theories. These were,

> (1) A trial court's decision to make a statutory appointment of counsel against the defendant's wishes is a matter of discretion. The court's discretion is not abused unless it appears that the attorney chosen by the court is substantially less competent than the attorney who is chosen by the defendant, or it appears that the court's attorney is committed to

a position or interest which would conflict with his ability to provide an effective defense.

(2) In order to show an abuse of discretion, the defendant must meet a burden of showing that there was some special reason which justified him in lacking confidence in the court's chosen attorney.

The majority dod not go so far as to hold that there was a burden on the defendant to show that there was some special reason to him to have confidence in his <u>own</u> chosen attorney.

The dissenters agreed with the majority insofar as they regarded the matter of forcing unwelcome counsel on the defendant as a question of discretion, but they parted company with the majority on the matter of criteria, concluding that they would compel the trial court to appoint the attorney who was chosen by the defendant because it appeared that there was no practical reason for the trial court to <u>refuse</u> to accept the defendant's choice. In other words, the dissenters took the view that the burden was not on the defendant to demonstrate that the trial court's appointment was

an abuse of discretion, but that the burden was on the trial court (or on the real party in interest, the People) to demonstrate that the appointment was not an abuse of discretion. In reaching this position, the dissenters expressed, inter alia, the following views:

> "In the foregoing factual context, how is the administration of justice served by the dogged insistence that Mr. Breiner and not Mr. Hodge represent the defendant? Phrasing the question another way: what compelling state interest is served by denying appointment of the qualified and willing attorney of defendant's choice? The obvious answer is: none."
>
> (P. 936 of 8 C.3d)

> "Effective advocacy involves more than vigor, experience and familiarity with the law. The attorney-client relationship contemplates trust and mutual cooperation, particularly when the attorney is defending the client's liberty.

(Smith v. Superior Court (1968) supra, 68 C.2d 547, 561 [440 P.2d 65, 74 (condensation of more extensive discussion)]) The desirability of a relationship of trust and confidence between an indigent defendant and his attorney has been elevated to indispensability as a result of this court's recent decision in People v. Sharp (1972) 7 C.3d 448, 449 P.2d 489, holding that a defendant has no constitutional right to defend pro se at trial . . . . Thus, in this case, the defendant must proceed with the appointed attorney . . . . it seems inevitable that this procedure will create serious problems in the administration of justice throughout the trial and future appeals, if any."

(Pp. 938-939 of 8 C.3d)

"There is an implication in these proceedings that because defendant is indigent and counsel is

> appointed, the need for trust and confidence between attorney and client is somewhat less significant. We firmly rejected a similar implication in Smith v. Superior Court, supra, 68 C.2d at pages 561-562. . . ."
>
> (Pp. 939-940 of 8 C.3d)

Both the majority and the dissenters in the Drumgo case agreed on the proposition that the refusal to appoint qualified private counsel of the defendant's choice is a matter of discretion, although they reached sharply opposite results on the same record. The opposed modes of reasoning from the same premise (that refusal to appoint qualified counsel of the defendant's choice is a matter of discretion) demonstrate the constitutional infirmity of this premise, and the constitutional chaos which must ensue from continued efforts to decide constitutional issues on the basis of that premise.

All of the justices of the California Court spoke of the desideratum (even the constitutional desideratum) of a good attorney-client relationship. The majority went at the

matter from one approach, the minority from another. All have shied away from a second, more fundamental, aspect of the matter. This is the matter of the independence of the attorney from the pecuniary control or influence of the trial court.

All of the California Justices agree that the defendant should have confidence in his attorney. None recognize the problem which any accused person, even one of the most limited intelligence, feels immediately and instinctively: Putting it in terms of the thinking of the accused, the problem which immediately and invariably presents itself is, "How can I trust an attorney who is beholden to the judge when he asks for his fee?"

The minority in the Drumgo case went so far as to say that the trial judge should, in appointing counsel, have in mind the desideratum of providing the accused with a trial "that is not only fair but gives the appearance of being fair." (P. 936 of 8 C.3d) And the minority even went so far as to quote, at page 938 of 8 C.3d, from the Report on the A.B.A. Project on Minimum Standards for Criminal Justice, Providing Defense Services (Tentative Draft, 1967) Section 2.3, at page 19, as follows:

"The goal, states the ABA, is 'to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can retain. Inequalities . . . are quickly percieved by those who are being provided representation and may encourage cynicism toward the justness of the legal system and, ultimately of society itself."

The California public defenders are guaranteed their funding independently of whether they happen to please the trial courts (California Govt. Code, Section 27700, ff.). Privately retained and compensated counsel likewise enjoy the same total freedom from pecuniary pressures. Hence the clients of both major classes of attorneys enjoy the same safety. The California Courts persistently assume, quite sub silentio, that the position of the third major class, those defendants who are both indigent and ineligible for the services of the public defenders, enjoy the same safety.

History (and even a modicum of common sense) teaches that the power of the purse,

however lightly held, and however often and well it may be self-restrained, is, despite the vaunted professionalism of the bar, a power of enormous vitality. Even assuming that the courts are presently blessed with nothing but ideal judges and ideal attorneys, the power of the purse represents nothing less than a continuing threat to the continued integrity of the adversary system of justice.

How can this persistent shadow across the courts be eliminated? There is only one clear answer, and that answer is for this court to hold that when an accussed person is unable to pay for private attorney services and is ineligible for public defender services, and thus qualifies for publicly-paid private representation, he and not the trial judge must, as a general rule, have the choice of counsel, at least when, although otherwise competent, he is not allowed the option of defending pro se.

This problem began to grow as soon as the decision in Gideon v. Wainright, supra, (1963) 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 799, was published. Inevitably, it must either be resolved by the doctrine which petitioner suggests, or it will continue to smoulder between the lines of such cases as Drumgo v. Superior Court, supra, (1973) 8 C.3d 930, ____P.2d____.

The minority in the Drumgo case remarked, referring to the proposed holding at page 940 of 8 C.3d,

> "While it might be desirable to recognize such a right [unqualified right of selection of private counsel] as an abstract principle, its application in the real world of criminal courts is fraught with complications."

Undoubtedly so. The same observation might be made with reference to the enunciation and enforcement of any great right or principle. Indeed, it is often said of the very institution of Democratic Government that it is a chaotic and corrupt system, ("fraught with complications") but it must also be said that all other systems are inferior to it, always becoming even more chaotic and corrupt (and more "fraught with complications").

It is ironic that the efforts of California and other States, not to mention the Federal Government, to extend the constitutional shelter of the Sixth Amendment to the indigent seem to have bred a new evil, that of the shadow of the

trial courts' powers of the purse over the shoulders of the particular class of indigent defendants to which Petitioner's client, Manson, belongs. But the impairment of the equal protection clause of the Fourteenth Amendment which falls on this class of accused persons is obvious. California and other states, including Colorado, Illinois, Minnesota and Wisconsin, have thus far shunted it aside, virtually pretending that it does not exist, much as our society used to deal with certain "social" diseases. Surely we can, and surely we must, do better.

DATED: July 17, 1973.

Respectfully submitted.

RENZI & KILBRIDE

Attorneys for Petitioner,
IRVING A. KANAREK,

By: Fred Kilbride
FRED KILBRIDE

APPENDIX "A"

ORDERS MADE IN THE COURTS BELOW:

(1) In the Court of Appeal, State of California, 4th District: Petition of Irving A. Kanarek for writ of mandate and writ of certiorari denied, November 1, 1972. (Case No. 4th Civ. 12365, Kanarek v. Superior Court, et al.)

(2) In the Supreme Court, State of California: Petition of Irving A. Kanarek for hearing following denial of petition for mandate/certiorari by Court of Appeal, denied, March 1, 1973. (Case No. 4th Civ. 12365 (sic) Kanarek v. Superior Court, et al.)

OPINIONS RENDERED IN THE COURTS BELOW:

No opinions filed.

APPENDIX "B"

PRESENTATION OF FEDERAL CONSTITUTIONAL QUESTIONS IN THE COURTS BELOW:

Petitioner specifically raised the contentions that the trial court's refusal to appoint and its refusal to order compensation under the California statute violated the defendant's rights to counsel, equal protection and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution, as shown by the following references to the certified record:

(1) In the Trial Court:

At pages 1, 2 and 12 of Petitioner's motion for compensation, originally filed as an Appendix to Petitioner's petition for writs of mandamus and certiorari in the California Court of Appeal.

(2) In the Court of Appeal, State of California:

At pages 10 and 16 of Petitioner's petition, with supporting argument naming the provisions, throughout the petition.

APPENDIX "B"

(3) In the Supreme Court, State of California:

At page 3. with supporting argument in the balance of the petition. Additionally, by virtue of California practice whereby the records of the Court of Appeal are forwarded to the Supreme Court upon the filing of petitions for review, the same citations as under category (2) hereinabove.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 14617 Victory Boulevard, Van Nuys California 91401.

On July 19, 1973, I served the within PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA on the Respondent and Real Party in Interest in said action, by placing t rue copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail at the Van Nuys Post Office, Van Nuys, California, addressed as follows:

SUPERIOR COURT, County of Los Angeles
111 North Hill Street
Los Angeles, California 90012

JOSEPH P. BUSCH, DISTRICT ATTORNEY
210 W. Temple Street
Los Angeles, California 90012

LOS ANGELES COUNTY COUNSEL
Suite 648, Hall of Administration
Los Angeles, California 90012

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on July 19, 1973, at Van Nuys, California.

GLENNA BAILEY

Subscribed and sworn to before me this 18 day of July, 1973.

Mary Ellen Reed

Notary Public in and for the County of Los Angeles, State of California

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IN THE

Supreme Court of the United States

..... Term, 1973

No. 73-164

IRVING A. KANAREK,
Petitioner,
vs.
SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, et al.,
Respondents.

On a Petition for a Writ of Certiorari
Directed to the Supreme Court of the State of California

BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

..... Term, 1973

No. 73-164

IRVING A. KANAREK,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

I

ISSUES PRESENTED

1. Whether petitioner has any substantive claim for compensation under California statutes.

2. Whether petitioner made a timely and proper claim for compensation under California's statutes and Constitution.

3. Whether the petition properly raises the issue of whether an indigent criminal defendant has a right to choose a particular publicly-compensated counsel to represent him.

4. Whether an indigent criminal defendant has a right to choose a particular counsel to be appointed by the Court and to be compensated out of public funds.

5. Whether a criminal defense attorney has a constitutional or common law right to be compensated out of public funds for representing an indigent criminal defendant where such representation was undertaken voluntarily and not by Court appointment or assignment and where such compensation was not demanded or requested until the completion of such services.

6. Whether the record of decisions without opinion by the state courts presents this Court with a federal question of substance.

II

STATEMENT OF CASE

The facts of the case reveal that the present petition, besides being substantively unmeritorious, is beset with procedural infirmities.

Petitioner became Mr. Manson's attorney by a written substitution of attorney and not by Court appointment.

> "Prior to the trial in said Action A253156, and by formal, written substitution, executed by the said Charles Manson, by the then attorney of record for the said Charles Manson in said Action No. A253156, Ronald Hughes, and by petitioner, which formal substitution as so executed was filed with

the respondent Court, petitioner became attorney of record for the said Charles Manson therein on May 27, 1970."

Petition for Writ of Mandamus and Writ of Certiorari, *Kanarek v. Superior Court,* 4th Civ. No. 12365, Page 1, Lines 21-27.

On June 1, 1970, the trial judge accepted the substitution of petitioner as attorney for Mr. Manson, but made clear that he was not making a court appointment.

"In making the above-mentioned order of substitution of petitioner for Mr. Hughes the Court stated: 'Very well, then, the Court will accept the substitution of attorneys. Mr. Kanarek is the attorney of record for Mr. Manson. Mr. Hughes is relieved as attorney of record. For the record, Mr. Kanarek, this is a private arrangement between you and Mr. Manson, and is not an appointment under 987 (a) of the Penal Code. Is there anything further, gentlemen?' "

Petition for Writ of Mandamus, etc., *supra,* Page 6, Lines 21-28.

Neither Mr. Manson nor petitioner at any time: (1) challenged the Court's characterization of the substitution as a private agreement; (2) requested appointment of petitioner pursuant to then Section 987a; or (3) sought to compel the trial judge to appoint petitioner under Section 987a as counsel for Mr. Manson.

Instead, almost two (2) years later, after completing his services as attorney for Mr. Manson, petitioner submitted a bill and requested that he be paid ninety thousand dollars ($90,000) in legal fees.

> "On or about April 17, 1972, pursuant to Penal Code Section 987.2, petitioner filed in said Action No. A253156 in Department 104 of the respondent Court, the Honorable Charles H. Older, Judge Presiding, a document entitled 'DECLARATION OF I. A. KANAREK ON BEHALF OF REQUEST FOR COMPENSATION AND COSTS IN CONNECTION WITH THE REPRESENTATION OF CHARLES MANSON.'
>
> * * *
>
> "Said Appendix A sets forth certain facts relating to petitioner becoming attorney of record for Charles Manson in said Action No. A253156, includes an itemization of the services performed pursuant to said representation, requests an evidentiary hearing as to the value of said services, and prays that petitioner herein be awarded the sum of $90,000.00 pursuant to his representation of Charles Manson in said Action No. A253156.
> "On July 6, 1972, in Department 104 of the respondent Court, the Honorable Charles H. Older, Judge Presiding, petitioner's request for compensation contained in said document (in effect a written motion to be paid pursuant to Penal Code Section 987.2) was denied. . . ."
>
> Petition for Writ of Mandamus, etc., *supra*, Page 2, Lines 5-24.

The "prayer" appended to the "declaration" petitioner filed with the trial court reads in full as follows:

> **"WHEREFORE, I. A. KANAREK, prays that he be paid $90,000.00 pursuant to his representation of Charles Manson in the above entitled case."**
> **Petition for Writ of Mandamus, etc., *supra*, Appendix A, Page 15, Lines 20-22.**

The Court of Appeal of the State of California, without opinion, denied the Petition for Writ of Mandamus. The California Supreme Court, without opinion, denied a petition for hearing on the action of the Court of Appeal.

III

PETITIONER HAS NO SUBSTANTIVE CLAIM FOR COMPENSATION UNDER CALIFORNIA STATUTES.

Petitioner's claim for reimbursement under the California statutory scheme, which provides for public compensation of attorneys assigned to represent indigent criminal defendants, is frivolous.

The statute provides solely for the compensation of Court-appointed attorneys.

> "In any case in which a person . . . desires but is unable to employ counsel *and* in which counsel is assigned in the superior court . . . to represent such a person in a criminal trial . . . such counsel . . . shall receive a reasonable sum for compen-

sation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county."

California Penal Code Section 987a (now Section 987.2(a)) in part. (Emphasis added.)

The statute creates two conditions precedent to any right of compensation by the attorney: (1) the desire but inability of the person to employ counsel; and (2) the assignment of such attorney to the case by the Court. Neither condition existed in this case.

First, Mr. Manson was able to employ counsel and did, in fact, employ Mr. Hughes and then substituted petitioner. Although Mr. Manson was indigent, the notoriety of the case may have been sufficient allure for these attorneys. And for all that appears from the petition and the record, the possibility of a private agreement between Mr. Manson and petitioner to pay for petitioner's services out of potential royalties for publications regarding the Manson Family, cannot be ruled out.

Second, the Court did not assign petitioner as counsel to anyone, but merely acceded to a private arrangement between Mr. Manson and petitioner whereby petitioner was substituted for Mr. Hughes as attorney for Mr. Manson.

Since the conditions of the statute are not met, petitioner has no right to compensation under the statute.

IV

PETITIONER DID NOT MAKE A TIMELY AND PROPER CLAIM FOR COMPENSATION UNDER CALIFORNIA'S STATUTES AND CONSTITUTION.

It is clear that, under Penal Code Section 987a (now 987.2), a Court is empowered to determine the reasonable sum for compensation of an attorney only where such attorney has been assigned by the Court. In this case, petitioner by "declaration' purported to request that compensation be determined by the trial court. At no time, however, up to and including the instant petition, has petitioner or his client sought to have petitioner "assigned" as counsel under the statute. Since compensation cannot be determined without prior assignment, the state courts properly refused petitioner's Petition for Writ of Mandate etc. which sought only to compel the trial judge to determine compensation.

Moreover, petitioner's claim in the state court was untimely, and laches was a sufficient ground for denial of the state petition. Petitioner undertook the representation of Mr. Manson on either May 27, 1970, when the substitution of attorney was filed with the trial court or on June 1, 1970, when the substitution was accepted by the trial court. But it was almost two (2) years later, on April 17, 1972, before petitioner requested public compensation for his services.

To the extent that there is any merit to petitioner's

present claim that petitioner and/or Mr. Manson had a right to have petitioner assigned as Mr. Manson's counsel, such claim should properly have been made in June of 1970 by writ of mandate.

Pre-trial mandate for such purposes has been expressly approved by the California Supreme Court.

> "Orders concerning the designation or substitution of appointed counsel are subject to such review [mandamus] (Citation)."
>
> *Drumgo v. Superior Court* (1973) 8 Cal. 3d 930, 933.

By neglecting to raise the issue of appointment at the time he undertook the representation and delaying almost two (2) years, until after his services had been completed, petitioner would seek to have the best of two worlds. He could pursue the private arrangement if (perhaps upon the acquital of Mr. Manson) such would seem profitable, or else he could seek compensation from the public. The equitable doctrine of laches should apply to bar relief by mandate.

But, in addition, petitioner is confronted with an absolute bar to payment by virtue of the California Constitution. Penal Code Section 987a (now 987.2) provides that compensation once determined shall be paid out of the general fund of the County. The California Constitution provides:

> "A local government body may not grant extra compensation or extra allowance to a public of-

> ficer, public employee, or contractor after service has been rendered *or* a contract has been entered into and performed in whole or in part, *or* pay a claim under an agreement made without authority of law."
>
> Article XI, Section 10 (Emphasis added).

Petitioner did not have a contract, and his service was rendered prior to any request for compensation having been made. Consequently, any compensation to petitioner would be "extra" and is barred under the cited provision of the California Constitution.

V

THIS PETITION DOES NOT RAISE THE ISSUE OF WHETHER AN INDIGENT CRIMINAL DEFENDANT HAS A RIGHT TO SELECT A PARTICULAR PUBLICLY-PAID COUNSEL.

Petitioner seeks to raise the broad issue of whether an indigent criminal defendant has a right to select and have appointed, and to have compensated from public funds, a particular attorney. But no such issue ever arose in this case.

It would appear from the record that Mr. Manson never requested the Court to appoint or assign petitioner as his counsel. Nor does it appear that the petitioner ever requested appointment or assignment under Penal Code Section 987a (now 987.2). By some private arrangement, the terms of which are not dis-

closed to this Court, petitioner was substituted for another counsel of Mr. Manson.

By contrast, in a recent case before the California Supreme Court, the defendant requested that a particular attorney be appointed to represent him. The attorney stated that he was ready, willing, and able to accept the appointment. The trial court refused to appoint the particular attorney requested but instead assigned another attorney. The criminal defendant then refused to confer with the new attorney and petitioned for a writ of mandate to compel the appointment of his desired attorney. *Drumgo v. Superior Court* (1973) 8 Cal. 3d 930. The issue of selection of a particular counsel was thus clearly focused in that case.

Here, however, since there was no request for the appointment of petitioner as Mr. Manson's attorney and no denial of such request by the trial court, the issue of the defendant's right to select publicly-compensated counsel is not presented in a justiciable manner.

Perhaps Mr. Manson did not wish to have counsel assigned by the Court because he had reached a satisfactory private arrangement with counsel and wished to retain his broad discretion to substitute counsel. Perhaps, also, if the issue of Court appointment of counsel had arisen, Mr. Manson might have agreed to accept some other counsel selected and assigned by the Court. Then again, perhaps petitioner did not wish to

be appointed, thinking at the time that his private arrangement was preferable to the compensation provided for by the statute.

In any event, Mr. Manson did have the benefit of petitioner's services, and, therefore, no issue involving Mr. Manson's right to counsel of his choice is presented.

VI

AN INDIGENT CRIMINAL DEFENDANT HAS NO RIGHT TO A PARTICULAR COURT-APPOINTED COUNSEL.

An indigent criminal defendant has no right to the appointment of a particular attorney but only to the appointment of a competent attorney. The California Supreme Court has recently considered this issue, and concluded as follows:

> "We have repeatedly held that constitutional and statutory guarantees are not violated by the appointment of an attorney other than the one requested by defendant. (Citations) The additional factor that requested counsel has indicated his willingness and availability to act does not raise any constitutional compulsion requiring his appointment. Our established rule conforms with those of the federal courts (e.g., *Brown v. Craven* (9th Cir. 1970) 424 F. 2d 1166, 1170; *United States v. Burkeen* (6th Cir. 1966) 355 F. 2d 241, 245; *Tibett v. Hand* (10th Cir. 1961) 294 F. 2d 68, 73; *United States ex rel. Mitchell v. Thompson* (S.D.N.Y. 1944) 56 F. Supp. 683, 688-689) and,

at least absent a statute expressly providing to the contrary, of our sister state courts (e.g., *Martinez v. People* (1971) 173 Colo. 515, 519 [480 P. 2d 843]; *People v. Gray* (1965) 33 Ill. 2d 349, 353-355 [211 N.E. 2d 369]; *State v. Fagerstrom* (1970) 286 Minn. 295, 299 [176 N.W. 2d 261]; *Rahhal v. State* (1971) 52 Wis. 2d 144, 147-148 [187 N.W. 2d 800]). (See generally ABA Project on Min. Standards for Crim. Justice, Providing Defense Services (Tent. Draft 1967) § 2.3, com. (b), pp. 29-30.)"

Drumgo v. Superior Court (1973) 8 Cal. 3d 930, at 934.

The California Supreme Court compared the question of selecting a particular private defense counsel with that of selecting a particular public defender.

". . . If, as is the case, an indigent defendant who is necessarily represented by the public defender may not select the particular deputy who will represent him (*People v. Stroble* (1951) 36 Cal. 2d 615, 629 [226 P. 2d 330]), then an indigent defendant for whom assigned counsel must be appointed should likewise not be entitled to be represented by a particular attorney.

"The appointment of counsel to represent an indigent rests, as always, in the sound discretion of the trial court, and there can be no abuse of that discretion when the court appoints competent counsel who is uncommitted to any position or interest which would conflict with providing an effective defense. . . ."

Drumgo v. Superior Court (1973) 8 Cal. 3d, 930, 934-935.

Respondents believe that the sound reasoning of the California Supreme Court on this matter requires no further amplification.

VII

NO RIGHT OF PETITIONER TO COMPENSATION.

Prior to the adoption of the statutory compensation scheme in California, a Court-appointed attorney served without compensation as an incident of his role as an officer of the Court. See *Rowe v. Yuba County* (1860) 17 Cal. 61; *Lamont v. Solano County* (1874) 49 Cal. 158; Note, 21 A.L.R. 3d 827-829.

In this case, petitioner was not appointed, has ignored the statutory scheme for compensation, and yet seeks compensation under that scheme. The principle of comity should foreclose petitioner from this abuse of the statutory scheme and from his purported unilateral choice of himself as a Court-assigned, publicly-compensated attorney.

> "What the concept [Our Federalism] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments. . . ."
>
> *Younger v. Harris* (1971) 410 U.S. 37, 44, 27 L. Ed. 2d 669, 676.

Stripped of its rhetoric, petitioner's claim amounts to the assertion that any attorney who represents an indigent criminal defendant may, at any time, without Court appointment, without contract or agreement with the public entity, without demand for payment prior to undertaking the service, and without regard to any private agreement such counsel may have with his client, demand public compensation for his services. This assertion finds no support in criminal or contract law or equity.

Under California contract law, there is no basis for an implied contract between petitioner and the County. The courts have denied recovery to attorneys who have performed services benefiting a public entity under circumstances more favorable to the plaintiff than in the present case. *Williamson v. Los Angeles County Flood Control District* (1st Dist. 1941) 42 Cal. App. 2d 622, 109 P. 2d 992.

Petitioner is, in truth, a volunteer with second thoughts. He entered the case neither seeking nor expecting public compensation for his services. Now he seeks to change his mind. This Court should not indulge petitioner's whims on this matter.

VIII

RECORD PRESENTS NO FEDERAL QUESTION OF SUBSTANCE.

Petitioner seeks a writ of certiorari directed to the California Supreme Court which denied without opinion petitioner's request for hearing on the California Court of Appeal's denial without opinion of his Petition for Writ of Mandamus etc.

Under California law, the denial of such a petition without a hearing is not generally construed as an adjudication on the merits. *People v. Medina* (1972) 6 Cal. 3d 484, 490-491, 492 P. 2d 686. And while the denial of a hearing by the Supreme Court is not without significance, neither does such denial mean that the opinion, if any, of the Court of Appeal is approved. *Di Genova v. State Board of Education* (1962) 57 Cal. 2d 167, 178, 367 P. 2d 865.

In this case, there was no written opinion by either the Court of Appeal or the Supreme Court of California. Consequently, it does not appear whether the decision of the state courts was on procedural grounds, state law grounds, or on the basis of the federal question petitioner presents to this Court. Since no federal question of substance is clearly presented by the record of this case, it would be inappropriate for this Court to grant certiorari.

IX

CONCLUSION

Petitioner has no basis in either law or justice to claim compensation for the services rendered Mr. Manson. The California courts had independent grounds for denying relief to petitioner. Those grounds were: (1) the petitioner failed to compel his appointment under Penal Code Section 987a as counsel for Mr. Manson prior to undertaking representation; (2) the petitioner failed to demand and to receive assurance of payment prior to rendering services as required under Article XI, Section 10, of the California Constitution; and (3) the Petition for Writ of Mandate etc. sought to compel only determination of compensation without seeking to compel assignment, which is a necessary precondition to compensation under the statute.

For the reasons stated herein, respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN H. LARSON,
County Counsel

JOHN P. FARRELL,
Deputy County Counsel
Attorneys for Respondents.

APPENDIX

Penal Code Section 987a (superseded by Section 987.2, effective in 1971).

"In any case in which a person, including a person who is a minor, desires but is unable to employ counsel and in which counsel is assigned in the superior court, municipal court, or justice court to represent such a person in a criminal trial, proceeding or appeal, such counsel, in a county or city and county in which there is no public defender, or in a case in which the court finds that because of conflict of interest or other reasons the public defender has properly refused to represent the person accused, shall receive a reasonable sum for compensatiion and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county.

"The Board of supervisors may by contract provide that any public defender duly appointed or elected may charge reasonable fees to the Department of Corrections for representing inmates of prisons under its control, and the Department of Corrections may upon approval by the court pay such fees into the county treasury to be placed in the general fund of the county.

"Counsel shall be appointed to represent, in the municipal or justice court, a person who desires but is unable to employ counsel, when it appears that such appointment is necessary to provide an adequate and effective defense for defendant."

Penal Code Section 987.2 (effective 1971, italicized portions were added effective in 1972).

"(a) In any case which a person, including a person who is a minor, desires but is unable to employ counsel and in which counsel is assigned in the superior court, municipal court, or justice court to represent such a person in a criminal trial, proceeding or appeal, such counsel, in a county or city and county in which there is no public defender, or in a case in which the court finds that because of conflict of interest or other reasons the public defender has properly refused to represent the person accused, shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county.

"(b) The sum provided for in subdivision (a) may be determined by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the total amount of compensation and expenses to be paid, which shall be within the amount of funds allocated by the board of supervisors for the cost of assigned counsel in such cases.

"(c) The board of supervisors may by contract provide that any public defender duly appointed or elected may charge reasonable fees to the Department of Corrections for representing inmates of prisons under its control, and the Department of Corrections may upon approval by the court pay such fees into the county treasury to be placed in the general fund of the county.

"(d) Counsel shall be appointed to represent, in the municipal or justice court, a person who desires but is unable to employ counsel, when it appears that such appointment is necessary to provide an adequate and effective defense for the defendant."